Supreme Court U.S.
FILED
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No. 08-73

In the Supreme Court of the United States

CONNIE C. RESHARD,

PETITIONER,

VERSUS

MAIN LINE HOSPITALS INCORPORATED d.b.a./a.k.a., MAIN LINE HEALTH AND THE LANKENAU HOSPITAL, DR. MICHAEL J. GLASSNER, DR. JOHN F. SCHILLING, MARK E. SCOTT, D.O., DR. KIMBERLY M. LENHARDT, DR. THOMAS J. MEYER, PULMONOLOGY ASSOCIATES, INC., AND DR. GEOFFREY P. TREMBLAY,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING
PETITION FOR WRIT OF CERTIORARI

CONNIE C. RESHARD,
PETITIONER, *PRO SE*
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I. SUMMARY

Petitioner urges the Court to reconsider and grant a petition for a *writ of certiorari*. Petitioner recognizes that it is not the responsibility of this Court to hear all valid cases. However, when the case confers a manifest injustice on one party that is so repugnant to the principals of democracy, I would suggest and hope that this Court would grant the petition in this instance.

It is compelling that several recent decisions in the United States Court of Appeals for the Third Circuit were decided in a manner inconsistent with the decision in this case. While I consistently disagree with the lower courts' findings about my behavior in managing the litigation, neither of them properly balanced such factors to the issue of the merits in the case. The longstanding presumption in federal courts is that the complaint is taken as true and that the judicial preference is to determine cases on the merits. Instead, both lower courts acted inconsistently with such principles of federal jurisprudence, by subordinating the merits of the case to a subjective determination when concluding that there was no proven basis indicating that the case is meritorious. Under the circumstances the appropriate source was the amended complaint in the case based on the stage of the litigation prior to the completion of discovery.

It is also compelling that the majority of judges in federal courts do not support the dismissal of a case for not attending proceedings ordered by the

court under circumstances presented in this case for a failure to prosecute. Just weeks ago, the Third Circuit did not appear to follow the *Poulis* principles in the same context as it did in my case. The principle of equal justice under law confers a guiding rule that manifest injustice in any case should not be tolerated.

II. RECENT THIRD CIRCUIT CASES SHOW INCONSISTENT RESOLUTION OF FAILURE TO PROSECUTE CASES UNDER RULE 41(b).

Petitioner asserts that several recent rulings by the Third Circuit in failure to prosecute cases underscore three principles not adequately addressed in this case: failure to consider actions Petitioner took to comply with the lower courts order including the interlocutory appeal, the failure to consider and take as true the merits of the case based upon the Amended Complaint and the failure to balance the merits against other factors.

The ruling in *N'Jai v. Floyd, et al., Sl Op., No. 08-2366, (Third Cir. October 16, 2008),* represents a departure from the standard the Third Circuit applied in this case. In that case, the district court dismissed the complaint with prejudice, after the plaintiff failed to file an amended complaint. The Third Circuit remanded the case. It noted that the *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 869 (3d Cir. 1984) standards had not been applied and suggested that the district court consider N'Jai's Notice of Appeal and Response regarding her attempt to enlarge the time in which to file the amended complaint. *See Note 1, Sl Op* at p. 4. Clearly, Petitioner attempted to mitigate the

situation by filing an interlocutory appeal with the Third Circuit. The Third Circuit does not have a blanket rule prohibiting the interlocutory review of discovery orders. *See, Smith v. Bic. Corp.*, 869 F.2d 194, 198 (3d Cir. 1989).

In my situation, I explained that the less than ten days provided by the district court judge were inadequate for providing the production with electronic discovery, specifically since the district court order made it clear that no changes would be accommodated. *Pet. App. 20; see also New Rules Applicable To The District Court for the Eastern District of PA at App. pp. 5-7.* Thus, no matter what I did I would have failed to comply with the district court's order. The fact that I filed an appeal should carry some weight since Judge Surrick's orders regarding discovery did not allow any changes in the provisions, constructively prohibiting a motion for an enlargement of time (and the defendant hospital would not schedule additional production dates without leave of court.)

This expected outcome is confirmed by the fact that Petitioner contacted counsel for Lankenau Hospital and Dr. Lenhardt many times since July 2002 regarding a complete certified true medical record for Petitioner. *App. at pp. 4-5.* During the March 20, 2003 deposition, it was clear that significant portions including electronic portions of the record were missing from the set provided to me that day. I specifically on the record requested the production of the true and complete set of medical records and sent a follow-up letter. *App. at p. 3.*

In another case the Third Circuit held that a district court must balance the *Poulis* standard, in particular consider the merits of the case based on

the statements contained in the complaint. *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008). The recent ruling by the Third Circuit in *Hernandez v. Palakovich, et al. 2008 U.S. App. LEXIS 20117* (No. 06-2060, September 19, 2008), Sl Op at p. 7. specifically stated in note 3 that the district court was required to take as true the facts presented in the complaint in assessing the merits. It stated: "For the purposes of this appeal, we take the allegations of the complaint as true..." In this case, the Third Circuit stated that it could not assess the merits of the case because it could not determine the merits from the record. *Pet. At App. at p. 4.* More importantly, the Third Circuit recently ruled that it has never held that lack of merit could be a determinative factor for dismissal under Rule 41(b), Fed. R. Civ. P. Yet in my case it held that it could not assess the merits based upon the record for certain, therefore that factor was not used to mitigate other factors. *Tucker v. Monroe*, 2008 U.S. App. LEXIS 17373 at Note 2, (No. 07-4385, August 12, 2008, Third Circuit) The decision in Petitioner's case is inconsistent with the application of *Poulis* in the most recent cases decided in the Third Circuit.

Consider also that Petitioner's interlocutory appeals that were pending until December 2004 and the objections to the November 26, 2003 order requiring a certificate of merit were the equivalent to responses to the district court order but such factors were not considered. It was the district court that was required to act subsequent to that time. *See, Hernandez v. Palakovich, et al.* at p. 7. (the failure of the district court to consider other pending pleadings was the equivalent to a response). In fact counsel for Dr. Michael Glassner asked the district court to hold

a status conference in March 2006. I was not the only party who believed that the district court judge was the party required to take action. Therefore, I was not required to do anything in order to avoid a failure to prosecute.

III. PETITIONER'S ACTIONS COULD NOT BE PREJUDICIAL TO RESPONDENTS UNDER POULIS WHEN THEY CLEARLY ACTED IN BAD FAITH.

In all respects, I acted in good faith. However, the defendants present issues of bad faith from the beginning. Lankenau Hospital, Dr. Kimberly Lenhardt and Dr. Michael Glassner through their respective attorneys initiated unauthorized discovery when each of them served discovery under the Pennsylvania Rules of Civil Procedure in August 2002, just weeks after service of process in the case including to parties who would not file timely Answers. *App. at pp. 1-3.* None of them had the authority to do so under Rule 26, Fed. R. Civ. P. Yet counsel for Lankenau Hospital filed on December 5, 2002 a motion to compel without disclosing this information about the discovery. Senior District Court Judge Robert F. Kelly granted the motion and did not vacate the order once the information was brought to his attention. I had treated the discovery requests as invalid since both of them were invalid. Glassner's counsel did re-file certain of its discovery but Lankenau Hospital and Dr. Lenhardt's counsel never re-filed such discovery. Petitioner could not have acted in bad faith regarding such discovery requests. However, clearly three parties to this litigation acted in bad faith.

Petitioner repeatedly requested complete medical records from Lankenau Hospital as indicated by an August 5, 2002 letter to the Hospital's counsel, Sharon Reiss and a March 24, 2003 letter to Paul Wright after the deposition of Dr. Lenhardt on March 20, 2003. *App. at pp. 3-5.* At the Lenhardt deposition, Dr. Lenhardt confirmed that the alleged complete medical record given to her did not contain information that she needed to respond to certain questions, *e.g.*, entire sections of the record were missing, *i.e.*, from April 4, 2000 to April 9, 2000, prior to the diagnosis that Petitioner had pulmonary emboli in both lungs.

When the district court judge ordered a certificate of merit on November 26, 2003, he set certain timeframes including the provision of the complete medical records by Lankenau Hospital by December 9, 2003. Pet. App. at 20. Again, that order also stated that no changes to timeframes provided would be changed. *Id.* I contend that the medical records subsequently provided at this time are still not complete. Further, I could not provide computer experts within that timeframe of December 9, 2003 for a number of reason including the process of indemnification of the computer forensic firm, the lack of prior knowledge of electronic details, information previously requested by interrogatories and production of documents from the hospital. Despite such protestations, I was not given additional time. How was I obligated to do anything further? I took the matter to the Third Circuit but the matters would be dismissed for lack of finality. The application of Rule 41(b), Fed. R. Civ. P. did not apply to this case under the circumstances. Similarly, the Third Circuit does not have a blanket

rule that discovery orders are not appealable. *See Smith v. Bic. Corp.*, 869 F.2d 194, 198 (3d Cir. 1989).

IV. CONCLUSION

Petitioner urges the Court to grant her petition and issue a *writ of certiorari*.

CERTIFICATION OF COUNSEL

Pursuant to Rule 44 (2), I certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay.

Connie C. Reshard

APPENDIX

August 1, 2002 Letter From Counsel For Lankenau Hospital And Dr. Kimberly Lenhardt, Sharon Reiss To Petitioner

POST & SCHELL pc
Attorneys at Law

Sharon M. Reiss
Direct Dial: 215-587-1047
Fax Number: 215-587-1444
Sreiss@postschell.com
File #114339
August 1, 2002
Connie C. Reshard
1101 Third Street, SW, No. 812
Washington, D.C. 20024
Re: Reshard v. The Lankenau Hospital, et al
Dear Ms. Reshard:
Enclosed please find our Interrogatories, Supplemental Interrogatories, Expert Witness Interrogatories and Request for Production of Documents of Defendants, Lankenau Hospital, et al directed to Plaintiffs. Please answer these interrogatories within the time prescribed by the Pennsylvania Rules of Civil Procedure
Thank you for your anticipated cooperation in this matter.
Very truly yours,
/s/
Sharon M. Reiss
SMR:flb
Encl.

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August 13, 2002 Letter From Counsel For Dr. Michael Glassner, Nancy K. Raynor To Petitioner

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August 13, 2002
Connie Reshard, Esquire, Pro Se
1101 Third Street, S.W. No. 812
Washington, D.C. 20024
RE: Reshard v. Glassner, M.D., et al.
Our File No. 87107

I enclose herewith the Interrogatories Addressed to Plaintiff, Sets I and II, and Request for Production of Documents Addressed to Plaintiff, on behalf of our client, Michael J. Glassner, M.D., in the above-captioned matter.

Kindly respond to the same in accordance with the time limits prescribed by the Pennsylvania Rules of Civil Procedure.

Very truly yours,
/s/
Nancy K. Raynor
NKR/klc
Enclosures
cc: Sharon M. Reiss, Esquire (w/enc.)

Kyle N. Thompson, Esquire (w/enc.)
John F. Schilling, M.D. (w/enc.)
Mark Scott, D.O. (w/enc.)
Geoffrey P. Tremblay, M.D. (w/enc.)
Unknown Resident c/o The Lankenau Hospital (w/enc.)

March 24, 2003 Letter to Paul Wright, Counsel Dr. Kimberly Lenhardt Deposition

March 24, 2003
VIA FACSIMILE
Paul Wright
Post & Schell PC
1800 John F. Kennedy Boulevard
19th Floor
Philadelphia, PA 19103-7480

RE: *Connie C. Reshard vs. The Lankenau Hospital, et al. U.S. District Court, Case No. 02-cv-1787*

Dear Mr. Wright:

During the deposition of Dr. Kimberly Lenhardt on March 20, 2003, you reserved the right for her to review and sign the deposition. This is to advise that I reserve the right to comment on any changes that are made on the transcript.

You did not comply with the production request accompanying the notice of oral deposition. Please advise me by C.O.B. today whether you intend to produce the documents by C.O.B. today. Otherwise I will file a motion to compel the production and request sanctions.

As I stated, I reserve the right to recall Dr. Lenhardt after you provide the production request and the completed filed of the incomplete file Dr. Lenhardt used to selectively refresh her recollection by reading into the record.

Respectfully yours,
/s/Connie C. Reshard

August 5, 2002 Letter From Counsel for Lankenau Hospital and Dr. Kimberly Lenhardt, Sharon Reiss to Petitioner

August 5, 2002
VIA FACSIMILE AND VIA MAIL
Sharon M. Reiss
Post & Schell PC
1800 John F. Kennedy Boulevard
Philadelphia, PA 19103-7480
RE: ***Connie C. Reshard vs. The Lankenau Hospital, et al. U.S . District Court, Case No. 02-cv-1787***
Dear Ms. Reiss:

I am in receipt of your letter and appearance for Main Line Hospitals Incorporated d/b/a, a/k/a Main Line Health of which The Lankenau Hospital is a member hospital, regarding the above styled case. I want a relationship of respectful decorum. Before I can make a determination as to whether or not an extension of time in which to respond to the summons and complaint (as amended) is appropriate, I need to know the amount of time involved. I must say that I am surprised that you do not have a file yet since your client began gathering a file in 2000 and more specifically in April 2002.

Also, please consider that before I can consider all of your requests, your client should provide the name of the native Oriental female resident doctor who appeared on April 8 and the morning of April 9, 2000. I would appreciate a stipulation to add the actual name of the doctor indicated as "unknown" on the complaint as amended, after your client's

identification as well as a waiver of service to your client.

Further, I would appreciate a complete, true and certified copy of all files as originally generated with respect to my association with The Lankenau Hospital. For example, the doctor referred to in the paragraph immediately above generated a discharge sheet. It too should be contained in the record. There is nothing more disrespectful to a patient, not to mention illegal, than to know that the hospital does not maintain the integrity of its records. Would it not be a wonderful world, if medical malpractice (did not exist but since it does) was just about assessing what happened based on the actual facts as they occurred and not about the reconstruction of the facts in the manner one side desires. Lets use the same set of documents on both sides.

Respectfully yours,

/s/

Connie C. Reshard

New Electronic Discovery Provisions In The United States District Court For The Eastern District Of Pennsylvania, Not Available To Petitioner

Exchange of e-discovery materials. Prior to the Rule 26(f) conference, the parties shall exchange the following information:

a. a list of the most likely custodians of relevant electronic materials, including a brief description of each person's title and responsibilities;

b. a list of each relevant electronic system that has been in place at all relevant times and a general description of each system, including the nature,

scope, character, organization, and formats employed in each system.

c. the parties should also include other pertinent information about their electronic documents and whether those electronic documents are of limited accessibility, that is, those created or used by electronic media no longer in use, maintained in redundant electronic storage media, or for which retrieval involves substantial cost;

d. the name of the individual responsible for the party's electronic document retention policies ("the retention coordinator");

e. a general description of the party's electronic document retention policies.

f. the name of the individual who shall serve as the party's "e-discovery liaison;"

g. A description of any problems reasonably anticipated to arise in connection with e-discovery.

To the extent that the state of the pleadings does not permit a meaningful discussion of the above issues by the time of the Rule 26(f) conference, the parties shall either agree on a date by which this information will be mutually exchanged or submit the issue for resolution by the court at the Rule 16 scheduling conference.

3. **E-discovery conference**. The parties shall discuss the parameters of their anticipated e-discovery at the Rule 26(f) conference and shall be prepared to address e-discovery at the Rule 16 scheduling conference with the court.

4. **E-discovery liaison**. To promote communication and cooperation between the parties, each party shall designate a single individual through whom all e-discovery requests and responses are made ("the e-discovery liaison"). Regardless of whether the e-

discovery liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she must be:

a. familiar with the party's electronic systems and capabilities in order to explain these systems and answer relevant questions;

b. knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues;

c. prepared to participate in e-discovery dispute resolutions; and,

d. responsible for organizing the party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.